IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 219

CARL SCHNELL AND THE GRIFFITH LABORATORIES, INC.,

Petitioners,

vs.

PETER ECKRICH & SONS, INC., AND THE ALL-BRIGHT NELL COMPANY,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Respondents' brief in opposition to the petition for certiorari incompletely phrases the question presented, relies on a decision that is not applicable to the instant situation and which was not even considered worth mentioning by the Court of Appeals even though it was argued at length before that Court, and presents fallacious arguments when it contends that the decisions cited in enumerated point 2 of Petitioners' reasons for granting the writ do not clearly conflict in result with the decision reached by the Court of Appeals for the Seventh Circuit in the above-entitled suit.

SPECIFIC ERRORS IN RESPONDENTS' BRIEF.

1. The Respondents' Brief Does Not Accurately State the Question Presented.

Page 2 of Respondents' brief does not accurately state the question presented.

Respondents' phrasing of the question presented avoids pointing out that Allbright-Nell openly defended on behalf of Eckrich (and in Allbright-Nell's own interest) and controlled the defense, *after* it had been named as a party in each of the suits. By omitting reference to the fact that Allbright-Nell's open and full control of the suits continued *after* it was named as a party thereto, Respondents attempt to escape the consequences of their continued puppeteering.

Once a defendant has been named as a party of record, clearly the court has jurisdiction to make findings concerning whether or not it is, in fact, present before the court.

2. Merriam v. Saalfield et al., 241 U. S. 22, Is Not Applicable.

On page 3 of Respondents' brief in opposition to the petition for writ of certiorari, they assert with respect to Reason No. 1 that the basic issue here presented has been adjudicated in *G. & C. Merriam Company* v. *Saalfield et al.*, 241 U. S. 22, 60 L. Ed. 868, 36 S. Ct. 477 (1916).

This assertion is without merit. The Court of Appeals did not even consider the *Merriam* case worth mentioning in its decision, despite the fact that it was presented and argued at length before that Court. The *Merriam* case was, likewise, disposed of by the court in *Redman* v. *Stedman Manufacturing Company*, 181 F. Supp. 5, 13 (M. D. N. C.—1960).

In *Merriam* v. *Saalfield*, the only issue before the Court was whether or not the doctrine of *res judicata* was applicable to the supplemental or ancillary proceedings. The acts relied upon *preceded* the naming of the party to the suit.

The suit was originally brought against Saalfield in Ohio for unfair competition. The bill was dismissed, but on appeal was reversed and remanded to the district court with instructions to enter an injunction and take an accounting. The district court made a decree in accordance with this mandate.

The Supreme Court held that there was not yet a *res judicata* on the basis of which supplemental or ancillary proceedings may be filed. No effort was made to join Ogilvie as a party in the original proceeding. The Court held it was not proper to insert Ogilvie in a subsequent proceeding on the basis of the record before it.

3. The Results Reached in the Decisions Cited in Point 2 of Petitioners' Reasons for Granting the Writ Are in Clear Conflict With the Decision of the Court of Appeals for the Seventh Circuit.

Starting on page 3, Respondents argue with respect to Reason No. 2 that the decisions cited by Petitioners in point 2 of Petitioners' reasons for granting the writ differ from the decision of the Circuit Court in "mere differences in reasoning." Petitioners have not relied on mere differences of reasoning, although they too exist, but instead rely upon differences or conflicts in *results*. On page 4 of their brief, Respondents then admit that the decisions cited by Petitioners are not in "perfect harmony" with the Circuit Court's decision.

Judge Platt's dissenting opinion (App. 6A-10A) points out that the decisions of *Ocean Accident & Guarantee Corp.*

v. *Felgemaker*, 143 F. 2d 950 (6th Cir. 1944), and *Redman* v. *Stedman*, 181 F. Supp. 5 (M. D. N. C.—1960), are controlling, and he thus rendered a decision that conflicts in *result* with that given by the majority of judges.

CONCLUSION.

It is respectfully requested that the petition for writ of certiorari be granted for the reasons set forth in the petition for writ of certiorari.

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